RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

RODNEY CLASS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF ALBERT W. ALSCHULER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

I am a member of the Illinois Bar and the Julius Kreeger Professor of Criminal Law and Criminology Emeritus at the University of Chicago Law School. I wrote my first article on guilty pleas and plea bargaining nearly fifty years ago, *see The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50 (1968), and I have published more than 700 law review pages on that subject. My interest in this case is simply that of a friend of this Court.[1]

SUMMARY OF ARGUMENT

Menna v. New York, 423 U.S. 61 (1975), and *Blackledge v. Perry*, 417 U.S. 21 (1974), support Petitioner Rodney Class's right to challenge on appeal the constitutionality of the statute he was convicted of violating. Class's claim, like those presented in *Menna* and *Blackledge*, would, if successful, forever preclude the state from obtaining a valid conviction against him. This claim should survive his guilty plea.

1. In fact, Class's claim should more clearly survive his plea than those of the petitioners in *Menna* and *Blackledge*. Unlike the petitioners in those cases, a defendant who establishes the unconstitutionality of his statute of conviction is

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[1] Pursuant to Supreme Court Rule 37.6, I declare that no counsel for a party authored this brief in whole or in part. My co-counsel and I are the only people who have made monetary contributions to the preparation and submission of this brief. In accordance with Rule 37.3(a), all parties consented to the filing of this brief. Petitioner provided blanket consent for all *amicus* briefs. A copy of Respondent's written consent was provided to the clerk upon filing.

innocent of any crime. Moreover, this defendant vindicates not only his own right to engage in constitutionally protected conduct but also the rights of others, many of whom might lack the resources, the legal standing, and the courage necessary to protect these rights themselves. A defendant's successful challenge to the statute he is alleged to have violated advances public interests as well as his own.

2. In habeas corpus proceedings, this Court has long afforded special protection to the right to challenge an unconstitutional statute. Even at a time when habeas petitioners were barred from presenting almost all other constitutional claims, this Court considered claims that petitioners had been convicted of violating unconstitutional statutes. *Ex Parte Siebold*, 100 U.S. 371 (1879). And when this Court denied full retroactivity to most decisions affording new constitutional protections to criminal defendants, it made an exception for decisions declaring "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"—in other words, to decisions declaring substantive criminal statutes invalid. *Teague v. Lane*, 489 U.S. 288, 307 (1989). Even a post-conviction petitioner who has pleaded guilty without questioning the criminality of his conduct may now obtain the benefit of a subsequent ruling that his conduct was lawful. *Bousley v. United States*, 523 U.S. 614 (1998). The Court should afford no less protection to the right to challenge the constitutionality of a statute on direct appeal than it provides in post-conviction proceedings.

3. The final section of this brief asks the Court not to preclude the possibility of affording greater protection to the right to challenge an allegedly unconstitutional statute than Class seeks here. Since this Court upheld the constitutionality of plea bargaining in 1970, this practice has become more troublesome. Increased sentences reflect both the efforts of prosecutors to gain plea bargaining leverage and the willingness of legislatures to supply it. Trials have become close to nonexistent. Boilerplate waivers that were almost unheard of in 1970 are now commonplace.

Prosecutors might respond to a decision recognizing Class's right to challenge the constitutionality of his statute of conviction by generating more boilerplate. Because Class's plea agreement neither expressly preserved nor expressly waived his right to challenge on appeal the constitutionality of his statute of conviction, his brief characterizes the issue in this case as what the contractual default rule should be. Brief for Pet. at 1, 2, 17, 19, 20, 21, 22, 35, 38, 44. Although this statement of the issue is accurate, it might convey the impression that added contractual language could make the right to challenge unconstitutional statutes disappear. The Court should avoid conveying this impression. It should make clear that the effectiveness of boilerplate waivers remains unresolved, as do other substantial issues.

ARGUMENT

I. *MENNA* AND *BLACKLEDGE* SUPPORT PETITIONER'S RIGHT TO CHALLENGE THE CONSTITUTIONALITY OF THE STATUTE HE WAS CONVICTED OF VIOLATING, AND HIS CLAIM IS IN FACT STRONGER THAN THE CLAIMS UPHELD IN THOSE CASES.

In *Menna v. New York*, 423 U.S. 61 (1975), and *Blackledge v. Perry*, 417 U.S. 21 (1974), this Court held that a guilty plea does not bar a defendant from arguing on appeal or in post-conviction proceedings that he was convicted in violation of the Double Jeopardy Clause or that he was prosecuted in retaliation for exercising a procedural right. In this case, Class maintains that his guilty plea should not bar him from challenging on appeal the constitutionality of his statute of conviction. Class's brief shows that, under the standard established by *Blackledge* and *Menna*, his claim should survive his plea. Demonstrating the statute's unconstitutionality would block his prosecution in the same way that a successful claim of double jeopardy or vindictive prosecution would.

Following the decisions in *Blackledge* and *Menna*, Professor Westin offered the following formula as the best way to reconcile these rulings with earlier decisions that guilty pleas forfeit most claims of antecedent constitutional violations:

> [A] defendant who has been convicted on a plea of guilty may challenge his conviction on any ground that, if asserted before trial, would forever preclude the state from obtaining a valid conviction against him, regardless of how much

> the state might endeavor to correct the defect. In other words, a plea of guilty may operate as a forfeiture of all defenses except those that, once raised, cannot be "cured."

Peter Westin, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214, 1226 (1977); *see United States v. Curcio*, 712 F.2d 1532, 1538 (2d Cir. 1983) (Friendly, J.) (declaring that Westin's "valuable commentary" has distilled the guiding principles of the Supreme Court's decisions concerning guilty-plea forfeiture).

Certainly the fact that a defendant's conduct was not a crime should "forever preclude the state from obtaining a valid conviction against him, regardless of how much the state might endeavor to correct the defect," and Class maintains that the statute he has been convicted of violating created no crime. His claim of innocence only makes his case stronger than those of the petitioners in *Menna* and *Blackledge* themselves.

Punishing someone for engaging in noncriminal behavior is obviously a grave injustice. Moreover, the public has an especially strong interest in preventing this injustice. Its resources are misspent when the government imprisons people for doing what the Constitution allows them to do. Beyond that, a litigant who establishes the unconstitutionality of a criminal statute vindicates the right of others to engage in behavior like his. When a statute makes this behavior a crime, it may not only chill but freeze the exercise of a constitutional right. Fearing punishment, people are likely to forego exercise of this right. Few may have the courage, the resources,

and the legal standing needed to challenge an unconstitutional criminal statute.

Professor Merrill notes that "some constitutional rights are not just private entitlements but also have aspects of public goods. In other words, the exercise of the right not only produces a private benefit for the rights-holder, but also generates positive externalities that benefit third parties or society more generally." Thomas W. Merrill, Dolan v. City of Tigard*: Constitutional Rights as Public Goods*, 72 Denv. U. L. Rev. 859, 862 (1995). Merrill uses economic language to explain why courts should be reluctant to find forfeitures of these rights and sometimes should refuse to enforce waivers that have been purchased by granting government benefits: "[I]ndividual valuation of the right will fail to take into account the positive externalities generated by exercise of the right, and thus routine enforcement of . . . waivers—especially on a mass scale . . .—could result in a suboptimal supply of these external benefits." *Id.*

When a defendant is punished for violating an unconstitutional statute, the injustice to the defendant himself runs deep, and the public interest in correcting this injustice runs deep too. The right that Class asserts merits protection at least as much as the rights vindicated in *Menna* and *Blackledge*. As the following section of this brief will show, this Court has long afforded distinctive protection to this right.

II. This Court's Habeas Corpus Decisions Have Afforded Special Protection to the Right Not to Be Convicted Under an Unconstitutional Statute.

In 1879, in *Ex Parte Siebold*, 100 U.S. 371 (1879), five prisoners convicted of violating a federal statute sought a writ of habeas corpus from this Court. They alleged that Congress had exceeded its power by enacting the statute they were convicted of violating. At the time, the Court adhered to "the black-letter principle of the common law that the writ was simply not available at all to one convicted of crime by a court of competent jurisdiction." Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 466 (1963) (citing *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193 (1830)).

The *Siebold* Court reiterated this rule:

> [The writ of habeas corpus] cannot be used as a mere writ of error. Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issue of the writ. Hence, upon a return . . . that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is, that he will be instantly remanded. . . . The only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.

100 U.S. at 375.

The Court nevertheless resolved on the merits the petitioners' claim that they had been convicted of violating an invalid statute. It cited *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670), noting that "[t]he opinion of Chief Justice Vaughan in the case has rarely been excelled for judicial eloquence." *Siebold*, 100 U.S. at 376. In *Bushell's Case*, the Court of Common Pleas granted habeas corpus relief to a juror who had defied a judge's instructions by voting to acquit William Penn of participating in an unlawful assembly. The case established that courts have no authority to hold jurors in contempt for violating judicial instructions.

Siebold found a similar lack of authority when a defendant was prosecuted for violating an unconstitutional statute:

> The validity of the judgments is assailed on the ground that the acts of Congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. . . . [P]ersonal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that . . . the question of the court's authority to try and imprison the party may be reviewed on *habeas corpus* . . . . [I]f the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the

> causes. Its authority to indict and try the petitioners arose solely upon these laws.

100 U.S. at 376-77. *See also Ex parte Yarbrough*, 110 U.S. 651, 654 (1884) ("If the law which defines the offense and prescribes its punishment is void, the court was without jurisdiction, and the prisoners must be discharged.").

This Court still quotes *Siebold* with reverence. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 730-31 (2016) (quoting *Siebold* while distinguishing procedural errors from the violation of "categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose").[2] Even at a time when this Court refused to consider claims on habeas corpus that an indictment did not state an offense, *Ex Parte Parks*, 93 U.S. 18 (1876), that a defendant had been placed twice in jeopardy for the same offense, *Ex parte Bigelow*, 113 U.S. 328 (1885), or that a defendant had been compelled to incriminate himself, *In re Moran*, 203 U.S. 105 (1906), it recognized an obligation to afford relief to a defendant convicted under an unconstitutional statute. *Siebold* shows the distinctive character of the right asserted in this case.

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[2] *Montgomery* held that state courts must give retroactive effect to *Miller v. Alabama*, 567 U.S. 460 (2012), which held mandatory sentences of life without parole for juveniles unconstitutional. *Montgomery* declared that "a court has no authority to leave in place a conviction or sentence that violates a substantive rule" and that "no grandfather clause . . . permits States to enforce punishments the Constitution forbids." 136 S. Ct. at 731.

More than a century after *Siebold*, this Court again gave this right special protection—protection it did not afford to other rights, including those vindicated in *Blackledge* and *Menna*. In *Teague v. Lane*, 489 U.S. 288 (1989), the Court adopted the position Justice Harlan previously had taken on the retroactivity of rulings announcing new constitutional rules of criminal procedure. The Court declared that newly announced procedural rules must be applied to all untried cases and all cases on trial or direct review when the rules are announced but that, with two exceptions, these rules do not entitle prisoners whose convictions were final at the time they were announced to habeas corpus relief.

The second of the Court's two exceptions allowed a habeas petitioner to claim the benefit of a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of criminal proceedings. *Teague*, 489 U.S. at 309-15. This exception afforded full retroactivity to decisions like *Gideon v. Wainwright*, 372 U.S. 335 (1963), which held that the Fourteenth Amendment's Due Process Clause entitles indigent defendants in state courts to the assistance of appointed counsel. This Court has not applied the second *Teague* exception to any post-*Teague* ruling.[3]

The first *Teague* exception has been much more influential. *See, e.g., Montgomery v. Louisiana*, *supra*, at 728-31. This exception was drawn verbatim from

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[3] *Teague* recognized that future decisions were unlikely to trigger this exception. *See Teague*, 489 U.S. at 313 (declaring it "unlikely that many such components of basic due process have yet to emerge").

Justice Harlan, and it allowed a habeas petitioner to claim the benefit of a new rule that places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 307 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)). This exception afforded full retroactivity to decisions like *Loving v. Virginia*, 388 U.S. 1 (1967), which recognized the constitutional right of people of different races to marry. In this case, Class maintains that that the Second Amendment places his primary conduct beyond the power of the criminal law-making authority to proscribe.

This Court effectively expanded the first *Teague* exception when it held *Teague*'s limitation of the habeas remedy inapplicable to new rules of substantive criminal law. *See Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). The Court now affords full retroactivity not only to decisions declaring defendants' conduct beyond the power of Congress to proscribe but also to decisions declaring that Congress has not in fact proscribed their conduct.

Bousley v. United States, 523 U.S. 614 (1998), illustrates the breadth of the current doctrine. After a post-conviction petitioner pleaded guilty to using a firearm during a drug transaction, this Court held in *Bailey v. United States*, 516 U.S. 137 (1995), that "use" required active employment of the firearm. The petitioner asserted that his use was not active, and this Court held that establishing his claim would entitle him to post-conviction relief.

Bousley held *Bailey* fully retroactive because "decisions of this Court holding that a substantive

federal criminal statute does not reach certain conduct . . . necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Bousley*, 523 U.S. at 620 (quoting *Davis v. United States*, 417 U.S. 333, 334 (1974)). Although the petitioner had not argued before trial, at trial, or on appeal that "use" meant active use and although he in fact had pleaded guilty, his default would be excused if he could show that the error in his case had "probably resulted in the conviction of one who is actually innocent." *Id.* at 623. Chief Justice Rehnquist wrote for the Court, "[O]ne of the principal functions of habeas corpus [is] 'to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.'" *Id.* at 620.

Although both the petitioner in *Bousley* and Class entered guilty pleas and although both maintained that their conduct was not criminal, Class's case is stronger than that of the petitioner in *Bousley* in several respects. First, unlike the petitioner in *Bousley*, Class contends not only that he is innocent but also that his conduct was constitutionally protected—that this conduct was beyond Congress's power to proscribe. Second, unlike the petitioner in *Bousley*, Class did not default his claim but instead litigated it fully in the district court prior to his guilty plea. Third, unlike the petitioner in *Bousley*, Class can establish his claim without any expansion of the record. And fourth, unlike the petitioner in *Bousley*, Class asserts his claim on appeal rather than in a post-conviction proceeding. Post-conviction relief is limited to "persons whom society has grievously wronged," and "an error that may justify

reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Brecht v. Abrahamson*, 507 U.S. 619, 634 (1993).

This Court's special treatment of claims on habeas corpus that a prisoner has been convicted under an unconstitutional statute (and, more recently, of claims that a statute has been held not to reach his conduct) indicates why Class's guilty plea should not bar his appeal in this case.

III. This Court Should Not Preclude Defendants Who Plead Guilty from Obtaining Greater Protection of the Right to Challenge Unconstitutional Statutes Than Petitioner Seeks in This Case.

In 1970, in *Brady v. United States*, 397 U.S. 742 (1970), this Court upheld the constitutionality of plea bargaining. It declared, "[W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary." 397 U.S. at 753. Since 1970, however, the plea bargaining process has grown more troublesome.

A. Post-Plea Challenges to the Constitutionality of a Defendant's Statute of Conviction Before *Brady*

This case itself provides a minor indication of how much things have changed. In an earlier era, prosecutors and courts apparently did not imagine

that a guilty plea would have the effect the government now proposes to give it.

The Supreme Judicial Court of Massachusetts anticipated the *Menna* standard more than a century before *Menna* and explained why this standard permitted challenges like Class's: "The plea of guilty is, of course, a confession of all the facts charged in the indictment . . . . It is a waiver also of all merely technical and formal objections . . . . But if the facts alleged and admitted do not constitute a crime against the laws of the Commonwealth, the defendant is entitled to be discharged." *Commonwealth v. Hinds*, 101 Mass. 209, 210 (1869).

In 1924, a defendant who pleaded guilty appealed his conviction to the Mississippi Supreme Court. Although the defendant did not contend that the statute of his conviction was unconstitutional, the court noticed this statute's unconstitutionality *sua sponte* and reversed his conviction. *Norwood v. State*, 101 So. 366 (Miss. 1924).

Three years before *Brady*, in *Loving v. Virginia*, 388 U.S. 1 (1967), this Court reviewed the convictions of a married couple who had struck a bargain and entered guilty pleas to violating two Virginia anti-miscegenation statutes. *See id.* at 3-4 (describing the defendants' pleas); Bryan Brown, *The Right to Love: Fifty Years Ago, in* Loving v. Virginia, *the Supreme Court Made Mixed-Race Marriages Legal Across the U.S.*, New York Times Upfront (Jan. 9, 2017), http://upfront.scholastic.com/issues/01_09_17/the-right-to-love/ (describing the bargain). This Court did not question the defendants' right to have their guilty pleas set aside and their convictions vacated if the statutes were unconstitutional, and

neither did the Commonwealth of Virginia. Its brief defended the statutes without any suggestion that the defendants' pleas had "inherently" waived a "nonjurisdictional" error—namely, their conviction of actions that, far from being a crime, were constitutionally protected. Brief of Appellee-Respondent, *Loving v. Virginia*, 388 U.S. 1 (1967) (OT 1966 No. 395), 1967 WL 93641. Perhaps it was unthinkable even to the Virginia prosecutors that the state would continue to punish Richard and Mildred Loving if they had done only what the Constitution allowed them to do. If the position the government urges in the present case had been the law, however, this Court could not have made its landmark decision in *Loving*.

A year after *Loving*, this Court again reviewed and accepted an appellant's contention that he had pleaded guilty to violating an unconstitutional statute—a gun-registration statute that required him to incriminate himself. Justice Harlan's opinion for the Court addressed the issue posed by the present case in a one-sentence footnote: "Petitioner's plea of guilty did not, of course, waive his previous claim of constitutional privilege." *Hayes v. United States*, 390 U.S. 85, 87 n.2 (1968).

B. The Enhanced Power of Prosecutors

The years since *Brady* have seen harsher sentences, a sharp increase in the number of guilty pleas, the near disappearance of trials, and the explosion of prison populations. In 1970, fewer than 200,000 inmates were confined in state and federal prisons. The rate of incarceration (the number of inmates per 100,000 people) was 96. Today the number of inmates confined in state and federal

prisons exceeds 1.5 million (a greater than seven-fold increase since 1970), and the incarceration rate is 471 (a five-fold increase). Wikimedia Commons, *File: U.S. Incarceration Rates 1925 Onwards.png*, https://commons.wikimedia.org/wiki/File:U.S._incarceration_rates_1925_onwards.png (last visited May 14, 2017).[4]

The federal prison population has grown from approximately 24,000 in 1970, Federal Bureau of Prisons, Historical Information, https://www.bop.gov/about/history/, to 189,000 today (a slightly less than eight-fold increase). Federal Bureau of Prisons, Statistics, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited May 14, 2017) (reporting the total number of inmates on May 4, 2017).

Among the causes of the growth of the federal prison population are mandatory minimum sentences that, in practice, are mandatory only for defendants convicted at trial. *Compare United States v. Washington*, 301 F. Supp. 2d 1306 (M.D. Ala. 2004) (bemoaning a judge's duty to impose a "draconian" forty-year sentence mandated by 18 U.S.C. § 924), *with* U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing* 90 (2004) (reporting that, after the exercise of prosecutorial discretion in

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[4] These figures do not include local jail inmates. With jail inmates included, the total number of people imprisoned in America becomes 2.1 million, and the incarceration rate becomes 670. U.S. Department of Justice, Bureau of Justice Statistics, Correctional Populations in the U.S. 2015 at 2 Table 1 & 4 Table 4 (2016), https://www.bjs.gov/content/pub/pdf/cpus15.pdf.

charging and plea bargaining, only 20% of the defendants whose offenses qualified for the supposedly mandatory sentences prescribed by § 924 in fact received them). Both mandatory minimum sentences and formerly mandatory sentencing guidelines contributed to a doubling of the amount of time a convicted federal offender could expect to serve. *Id.* at 46.[5]

When the Federal Sentencing Guidelines were new, I wrote that, although they were likely to increase the bargaining power of prosecutors, "[g]uilty plea rates are currently so high that even substantial increases in prosecutorial bargaining power cannot yield great increases in these rates." Albert W. Alschuler, *The Selling of the Sentencing Guidelines*, *in* The U.S. Sentencing Guidelines: Implications for Criminal Justice 49, 91 n.4 (Dean Champion ed., 1989). But I was wrong. Guilty pleas, which accounted for 87% of federal district court convictions in the years before the Guidelines, *see* U.S. Sentencing Comm'n, *supra*, at 30, account for 97% today. *See* United States Attorneys' Statistical Report Fiscal Year 2015, Table 2A, https://www.justice.gov/usao/file/831856/download. As criminal caseloads and criminal dispositions have grown, the absolute number of criminal trials in the

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[5] Harsher prison sentences are not the only reason for the growth of the federal prison population. Even in periods of falling crime rates, both federal criminal caseloads and the proportion of convicted offenders sentenced to prison have increased. U.S. Sentencing Comm'n, *supra*, at vi, 76. It seems likely that, by reducing the cost of imposing criminal punishment, plea bargaining has given America more of it.

federal district courts has declined—from 5,097 in 1962, to 3,574 in 2002, to 2,220 in 2015. Mark Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459, 493 (2004) (providing the figures for 1962 and 2002); United States Attorneys' Statistical Report, *supra*, at Table 2A (providing the figure for 2015). Professor Miller remarks that the Guidelines have "achieved the virtual elimination of criminal trials in the federal system." Mark L. Miller, *Sentencing Equality Pathology*, 54 Emory L.J. 271, 277 (2005).

In *Missouri v. Frye*, 566 U.S. 134 (2012), this Court noted, "[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes." *Id.* at 144 (quoting Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 (2006)). The Court added in *Lafler v. Cooper*, 566 U.S. 156 (2012), "The expected posttrial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view the full price as the norm and anything less a bargain." *Id.* at 168 (quoting Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Calif. L. Rev. 1117, 1138 (2011)).

The Court's observations describe not just particular cases, but the American criminal justice system generally. It is doubtful that any polity would sentence 95 percent of all offenders to less than they deserve or to less than is necessary to protect the

public. Officials seem far more likely to impose "extra" punishment on a small minority of offenders to discourage exercise of the right to trial. The United States now imprisons a higher proportion of its population than any other nation in the world except the Republic of Seychelles. Roy Walmsley, World Prison Population List 2 (11th ed. 2015), http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf. It could not have achieved its record for mass incarceration by sentencing 95 percent of all offenders to less than they deserve.[6]

C. Boilerplate Waivers

If this Court rules in Class's favor, prosecutors are likely to add language to plea agreements in an effort to preclude challenges like his. This Court's decisions do not indicate whether their efforts would be effective. The Court's only examination of due process limits on plea-bargained waivers came in

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[6] I have commented:

> An agreement produced by an improper threat ("your money or your life") is involuntary, and a threat to impose "extra" punishment for standing trial is surely wrongful. The Constitution affords a right to trial, which means at a minimum that the government may not make standing trial a crime. . . . [The Supreme Court's empirical observations in *Lafler* and *Frye*] decimate the "voluntariness," "personal autonomy," "libertarian," or "freedom of contract" defense of plea bargaining.

Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 Albany L. Rev. 919, 923-25 (2016).

United States v. Ruiz, 536 U.S. 622 (2002). *Ruiz* held that the government may condition a plea agreement upon a waiver of the right to receive impeachment information from the government, but it left open whether the Constitution bars the government from insisting upon a waiver of the right to receive other *Brady* material or a waiver of other rights. *See id.* at 629; *Brady v. Maryland*, 373 U.S. 93 (1963).

Prosecutors have used their power not only to increase the number of guilty pleas but also to transform guilty pleas into broader waivers of rights. Agreements foreclosing the right to appeal were rare when *Brady* was decided. *See* Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127, 128-29 (1995) (declaring that appeal waivers "emerged" "in recent years" and citing decisions in 1982 and 1986 that called these waivers "uncommon" and "not a widespread practice"). But the Federal Rules of Criminal Procedure now recognize these waivers, *see* Fed. R. Crim. P. 11 (b)(1)(N) (requiring courts to determine that a defendant understands "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence"), and "[i]n nearly two-thirds of the cases settled by plea agreement in [a federal court] sample, the defendant waived his right to review." Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 212 (2005).

Other broad waivers remain controversial. In *Lafler*, *supra*, and *Frye*, *supra*, this Court held that defendants are denied the effective assistance of counsel when their lawyers fail to inform them of offers made by prosecutors and they later receive

sentences more severe than the prosecutors proposed. The Court's rulings pleased many commentators, one of whom observed, "The Supreme Court's decisions in these two cases constitute the single greatest revolution in the criminal justice process since *Gideon v. Wainwright*." Adam Liptak, *Justices' Ruling Expands Rights of Accused in Plea Bargains*, N.Y. Times, Mar. 22, 2012, at A1 (quoting Wesley Oliver). Another proclaimed, "Finally, the Court has brought law to the shadowy plea-bargaining bazaar." Stephanos Bibas, *Taming Negotiated Justice*, 122 Yale L.J. Online 35 (2012).

After this Court's decisions, however, a former federal prosecutor proposed adding the following language to all plea agreements:

> [T]he defendant is aware that defense counsel vary considerably in quality and experience, and that there is no advance guarantee that counsel in this case will give sound or even competent advice . . . . Knowing . . . that he may receive poor advice from his counsel, and that such advice (or failure to advise) may result in an outcome less favorable than he would receive with a typically competent lawyer, the defendant waives any remedy that would involve vacating his conviction or lessening the sentence ultimately imposed, in exchange for the government's agreement to negotiate a disposition of this case.

Bill Otis, Comment on *One Notable Case Showing Impact of and Import of* Lafler *and* Frye, Sent'g L. & Pol'y Blog (Nov. 26, 2012), http://sentencing.typepad.com/sentencing_law_and_policy/

2012/11/one-notable-case-showing-impact-and-import-of-lafler-and-frye.html.

Perhaps this former prosecutor's incantation can make two "landmark" Supreme Court decisions disappear, but courts, commentators, and state bar ethics committees disagree about the permissibility of the waivers he proposed. *See* Nancy J. King, *Plea Bargains that Waive Claims of Ineffective Assistance: Waiving* Padilla *and* Frye, 51 Duq. L. Rev. 647, 648-51, 662-65 (2013); Susan R. Klein *et al.*, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73 (2015); J. Vincent Aprile II, *Waiving the Integrity of the Criminal Justice System*, Crim. Just., Winter 2010, at 46; R. Michael Cassidy, *Some Reflections on Ethics and Plea Bargaining: An Essay in Honor of Fred Zacharias*, 48 San Diego L. Rev. 93, 108 (2011) ("Insisting on so-called ineffective counsel waivers impresses me as overreaching of the worst sort and fundamentally inconsistent with a prosecutor's obligation as a minister of justice.").

At present, the Justice Department does not allow federal prosecutors to include waivers of the right to effective legal assistance in their plea agreements. *See* Memorandum from Deputy Attorney General James M. Cole: Department Policy on Waivers of Claims of Ineffective Assistance of Counsel (Oct. 14, 2014), https://www.justice.gov/file/70111/download (declaring that although the Department of Justice "is confident that a waiver of a claim of ineffective assistance of counsel is both legal and ethical," "[f]ederal prosecutors should no longer seek in plea agreements to have a defendant waive claims of ineffective assistance of counsel.").

Descriptions of this case as presenting only an issue of what contractual default rule to apply could convey the impression that added language precluding constitutional challenges would be unproblematic. Readers of the Court's opinion in this case should understand, however, that this issue remains unresolved.

Despite my harsh criticism of plea bargaining, I have acknowledged that "[t]he time for a crusade to prohibit plea bargaining has passed." Albert W. Alschuler, Lafler *and* Frye*: Two Small Band-Aids for a Festering Wound*, 51 Duq. L. Rev. 673, 706 (2013). Reservations about this practice, however, caution in favor of preserving the ability to litigate issues of special importance to the public—including the constitutional validity of criminal statutes.

CONCLUSION

In cases like *Ex Parte Siebold*, 100 U.S. 371 (1879), and *Teague v. Lane*, 489 U.S. 288 (1989), this Court has afforded special protection to the right not to be convicted under an unconstitutional statute. The Court should protect this right by allowing Rodney Class to challenge on appeal the constitutionality of the statute he was convicted of violating. The Court should also leave open the possibility of affording this right greater protection than is at issue in this case.

Respectfully submitted,

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